Supreme Court, U.S.
FILED
MAR 13 2001
CLERK

No. 00-1220

In The

Supreme Court of the United States

NEVADACARE, INC.,

Petitioner,

v.

RUBY SIMKINS and M & K ENTERPRISES,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF TO BRIEF IN OPPOSITION

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PETITIONER'S BRIEF IN REPLY TO RESPONDENTS' OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

NevadaCare, Inc. ("NevadaCare") respectfully submits its brief in reply to the Opposition filed by the Respondents Ruby Simkins and M & K Enterprises ("Respondents") on March 1, 2001. Both of the questions posed by NevadaCare's petition meet the mandates of Supreme Court Rule 10: one is an important question of federal law that has not yet been addressed by this Court and the other seeks to resolve a conflict among the circuits on the application of *contra proferentem*.

REBUTTAL ARGUMENT

THIS COURT SHOULD RESOLVE THE DIFFERENCES AMONG CONGRESSIONAL ACTS OF EQUAL DIGNITY

According to the Bureau of Labor Statistics, nearly 75 percent of full-time employees participate in employer-sponsored health care plans. U.S. DEPARTMENT OF LABOR, BUREAU OF LABOR STATISTICS, BULLETIN 2517, EMPLOYEE BENEFITS IN MEDIUM AND LARGE PRIVATE ESTABLISHMENTS, 1997 (September 1999). The percentage of those employees whose plan includes health coverage by a health maintenance organization (HMO) has steadily risen from 17 percent in 1991 to 33 percent in 1997. *Id.* Thus, in the decades since their creation, HMOs have become a part of the ERISA landscape; their participation is not hypothetical or tenuous. The threat posed by the Ninth Circuit's decision in *Simkins*, pitting an HMO's duty to provide low-cost health care against ERISA's requirement for a

clear and concise plan description, is likewise very real and must be addressed.

Specifically, this Court should resolve the questions posed by the Ninth Circuit's interpretation of 29 U.S.C. § 1022(a): can an average person understand basic medical terminology, and can that average person's understanding of her treatment be used to create an ambiguity in otherwise unambiguous plan language?

Although the Respondents would like to bind this case to its facts, the effects of the *Simkins* decision are far reaching. This case has never been about Respondents misunderstanding what policy language NevadaCare used to deny Mrs. Simkins' claim.[1] The Ninth Circuit would have the "person of average intelligence" read her plan description in a vacuum, without any knowledge of her medical condition or treatment which she gained in consulting with her physicians. The suggestion that an average person would consider a serious and complex procedure such as HDC/PSCR to be a blood transfusion is unreasonable.

In *Schachner v. Blue Cross and Blue Shield of Ohio*, 77 F.3d 889, 896 (6th Cir. (Ohio) 1996), *cert. denied*, 519 U.S. 865, 117 S. Ct. 173, 136 L. Ed. 2d 114, 65 U.S.L.W. 3247

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[1] At the time M & K Enterprises sought coverage from NevadaCare, Mrs. Simkins did not know her cancer had returned. (Pet. p. 4.) Upon Dr. Glaspy's recommendation that she undergo HDC/PSCR, Mrs. Simkins' request for pre-approval was denied in a letter dated April 30, 1998 based on the plan's exclusion of all tissue transplants except allogenic bone marrow transplants. (Pet. p. 5.)

(1996), cited by Respondents, the Sixth Circuit reached a conclusion antithetical to *Simkins*:

> **That the insured and the insurer may disagree over whether a particular treatment or procedure falls within an insurance certificate's scope of coverage does not necessarily make the language of the certificate ambiguous.** It is often necessary for health insurers to use broad language in drafting insurance contracts. It would be impractical, if not impossible, to include an exhaustive list of the treatments and procedures covered by a general health insurance contract. The language is ambiguous only if, on its face, it admits of two different interpretations. **(Emphasis added.)**

Not only is this a question of national importance, it appears there is also a circuit split.[2]

Finally, the case of *Hendricks v. Central Reserve Life Insurance*, 39 F.3d 507 (4th Cir. (S.C.) 1994), also cited by

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[2] As set forth in the Petition at pps. 11-13, there is a split of authority on this issue. *Compare Masella v. Blue Cross Blue Shield of Conn.*, 936 F.2d 98 (2d Cir. 1991) (approving district court's allowance of medical testimony) and *Brewer v. Lincoln Nat'l Life Ins. Co.*, 921 F.2d 150 (8th Cir. 1990), *cert. denied*, 501 U.S. 1238, 111 S. Ct. 2872 (1991) (court must concentrate on a layperson's understanding of a condition). In *Schachner*, the Sixth Circuit remanded the issue of whether the plan participant's cardiac rehabilitation fell within the scope of coverage to the district court to receive further evidence. See also, *Hendricks v. Central Reserve Life Insurance*, 39 F.3d 507 (4th Cir. (S.C.) 1994) (appellate courts must defer to district court's evaluation of medical expert testimony). In the instant case, the Ninth Circuit admitted that the district court found that "the undisputed evidence" shows that HDC/PSCR is a tissue transplant. App. 12.

the Respondents, further demonstrates a split between circuits on the issue of unbundling complex procedures to find coverage in an ERISA plan. The *Hendricks* courts refused to fragment HDC/PSCR when the insurer's denial of coverage was based on an exclusion for experimental treatments. The question is then whether unbundling—a disallowed practice under Medicare—will be allowed under ERISA contingent upon the insurer's reasoning in denying the claim, i.e., a specific policy exclusion rather than experimental. While both *Simkins* and *Hendricks* dealt with HDC/PSCR, the application of the unbundling principle could reach common, everyday procedures excluded from plan coverage, but which are nonetheless the sum of various covered procedures (for example, radiology, administration of drugs, hospital stay).

THE ISSUE OF *CONTRA PROFERENTEM* IS RIPE FOR DETERMINATION BY THIS COURT

The application of *contra proferentem* in *Simkins*

Respondents' opposition alleges that the Ninth Circuit did not apply the *contra proferentem* rule in "reaching its decision that the district court erred in granting summary judgment in favor of the petitioner." (Resp't Opp'n p. 19.) However, Respondents admit that the Ninth Circuit applied this rule in entering summary judgment in favor of Simkins. (Resp't Opp'n p. 19 n.3.) This is in harmony with NevadaCare's Petition which states that the Ninth Circuit ruled that, "any jury hearing this case would be required to interpret any ambiguity in the favor of the insured, and, as such, directed the District Court to

enter summary judgment on behalf of the plaintiff." (Pet. p. 9.)

NevadaCare's Petition addresses not only those grounds on which the Ninth Circuit reversed the district court's decision, but also those grounds on which the Ninth Circuit relied on to mandate summary judgment be entered on behalf of Respondents. As such, the Petition asks this Court to settle the conflict among the circuits concerning *contra proferentem*, the contract interpretation principle employed by the Ninth Circuit to find that the district court was required to enter summary judgment in favor of Simkins.

The dispute among the circuits

In their opposition Respondents argue that this Court should not grant review on NevadaCare's *contra proferentem* question, asserting that the rule "is not an important matter for the highest court in the country to review." (Resp't Opp'n p. 18 n.2.) Additionally, Respondents argue that this Court has "consistently denied *certiorari* to cases determining the ambiguity/non-ambiguity of specific policy provisions within an ERISA policy[.]" (Resp't Opp'n p. 21.) Respondents' assertions ignore the national importance of uniform interpretation of policy language in ERISA plans.

Employment-based health insurance is "by far the most common source of health coverage in the United States" even at time when insurance costs are increasing. *Hearing on Health Insurance Coverage and Uninsured Americans before Senate Comm. on Health, Education, Labor and Pensions*, October 4, 2000 (statement of Paul Fronstin,

Ph.D. of the Employee Benefit Research Institute). Over 160 million Americans rely on privately sponsored employer health and welfare plans subject to the requirements of ERISA. Brief of Amicus Curiae of American Ass'n of Health Plans in Support of Petitioners, 1999 WL 1054919 at *5, *Pegram v. Herdrich*, 120 S. Ct. 2143, 143 L. Ed. 2d 164 (2000), *citing* Peter T. Kilborn, *Insurers Raise Health Coverage Costs to New Highs*, THE TOPEKA CAPITAL-JOURNAL, December 20, 1998.

However, currently there is little uniformity among the circuits as to the method to interpret the language of such policies. Under the current haphazard application of *contra proferentem*, the same policy may be interpreted differently in Nevada, Utah or Illinois as it would in Tennessee, Virginia or New York. This is certainly not the "federal common law of rights and obligations" contemplated by this Court in *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 56 (1987).

Americans view health insurance as the most important work benefit, and employment-based coverage is expected to expand. *Hearing on Health Insurance Coverage and Uninsured Americans*. From 1998 to 1999 alone, the percentage of small employers offering health insurance jumped from 54 to 67 percent. *Id.* The shear number of Americans participating in ERISA plans, both now and in the future, demonstrates that the method used by courts to interpret plan language is an issue of national importance. Therefore, this Court should grant NevadaCare's Petition and determine if *contra proferentem* is applicable to plans governed by ERISA, and if so, when it should be invoked and the extent to which it should be applied.

CONCLUSION

The *Simkins* decision, by rewriting not only the terms of the plan but also the history of the claim presentation and review, sets a dangerous precedent for the drafters of ERISA plan health insurance policies, and for the district courts which interpret them. This Court should grant review to NevadaCare's petition to create uniform standards for drafting and interpreting ERISA plans.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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March 12, 2001